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D.B. CIVIL SPECIAL APPEAL NO. 69/2007

Date of Order : 10.07.2007

HON'BLE THE ACTING CHIEF JUSTICE SHRI RAJESH BALIA
HON'BLE JUSTICESHRI MAHESH CHANDRA SHARMA

Mr. S.P.Sharma for the appellant

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Heard learned counsel for the parties.

This appeal is directed against the order of the learned Single Judge not deciding the issue raised before him on merit but leaving the parties to agitate the correctness and legality of the order under challenge in appeal that may be filed at a later stage. However, in the facts and circumstances of the case to be noticed presently, we are of the opinion that since the question goes to the root of the matter about the right of the respondents to lead secondary evidence when the original document, which was alleged to be in possession of the police that has been produced on requisition.

The respondent has filed the civil suit along with a photocopy of document in question alleging that the original of the document is in custody of police in connection with some criminal case in which it was a material document. During the course of

trial, the respondent plaintiff has moved an application for requisitioning the original document of the said photocopy from the police. Since the document was not produced for considerable long period the petitioner had approached this Court and the court had observed that if the police, in whose custody the document is alleged, has not produce the original of the photocopy, the petitioner may make an application to lead secondary evidence to prove the original of the photocopy. However, before the order on application to lead secondary evidence in respect of photocopy could be passed the police had produced the document from its custody.

On the production of the original of the photocopy from the police custody the plaintiff urged that it is not original but the document produced by the police is a forged one which is suppressed. In other words, the plaintiff claimed that police has produced the forged document. The court by an ocular comparison of the photocopy produced by the plaintiff and the document produced by the police found that there is some discrepancy between the two and presumed that the original document has not been produced and permitted the plaintiff to lead secondary evidence to prove the photocopy of the original produced to him.

The order passed by the trial court ignoring the basic principle to be adhered to before permitting secondary evidence to be brought on record. It was the plaintiff's case that the original of photocopy produced by him is in custody of police. The document purporting to be the original document recovered from the plaintiff was brought before the Court by the police that is to say that from the custody in whose possession the document was alleged to be. In these circumstances, without holding any enquiry in the genuineness of the document produced by the police and reaching the finding about its genuineness no presumption could have been drawn about the nature of the document produced from the proper custody and permit the plaintiff to lead secondary evidence about the document of which the photocopy was produced by him. In the absence of any such finding, the trial court could not have resorted to permit the plaintiff to lead secondary evidence by rejecting the document produced from the proper custody which was an appropriate custody according to the plaintiff. Before resorting to admit secondary evidence, it was necessary for the Court to have enquired into the genuineness of document produced by police and record its finding. Before considering said aspect to permit leading of secondary evidence means assumption of document produced from the police custody to be not the original and primary evidence. As a matter of fact the plaintiff requested the

court to summon primary evidence from police custody. On production of such document without rejecting the said evidence to be not a primary evidence of the fact a non availability of primary evidence, the court had no jurisdiction to permit secondary evidence to be brought on record. Such a finding could not have been recorded on merely finding same discrepancy between photocopy and the original document on ocular inspection. There was no material to presume that photocopy which itself is a secondary evidence is the correct copy of the original, as if, there cannot be any concocted photocopy.

The procedure adopted by the trial court has resulted in giving unfair advantage to one party over the other.

In that view of the matter, the order permitting the plaintiff to lead secondary evidence at this juncture and leaving the matter to be agitated in appeal after the secondary evidence has been brought on record cannot be sustained.

Accordingly, the appeal is allowed and the order under appeal is set aside so also the order passed by the trial court dated 18.08.05 is set aside. We direct that before deciding the application under Section 65 of the Indian Evidence Act for permitting the plaintiff to lead secondary evidence, question about

the genuineness of the document produced by the police be examined and thereafter, an application under Section 65 may be decided in the light of finding recorded thereon.

No costs.

(MAHESH CHANDRA SHARMA),J. (RAJESH BALIA)A. C.J.

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